

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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MICHAEL D. BURCH and THE
BANKRUPTCY ESTATE OF MICHAEL
D. BURCH,

Plaintiff,

v.

NO. CIV. S-04-0038 WBS GGH

MEMORANDUM AND ORDER
RE: PRIVILEGED MATERIALS
SUBMITTED UNDER SEAL FOR
IN CAMERA INSPECTION PURSUANT
TO COURT ORDER

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, LARRY VANDERHOEF,
GREG WARZECKA, PAM GILL-
FISHER, ROBERT FRANKS, and
LAWRENCE SWANSON,

Defendants.

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On July 22, 2005, the court issued an order directing defendants to produce certain documents. The court modified the order on July 29, 2005, to allow defendants to submit under seal all allegedly privileged documents to the court for in camera review. Defendants submitted the allegedly privileged documents on August 10, 2005 along with briefing to support defendants' assertions of privilege. Plaintiffs responded to defendants' briefing on August 17, 2005 and moved the court to reject all

1 defendants' claims of privilege and to compel defendants to
2 produce all withheld and other responsive documents. Defendants
3 replied to plaintiffs' response. The court now addresses
4 defendants' privilege claims.

5 Defendants have refused to produce to plaintiffs
6 certain documents that defendants claim are protected from
7 disclosure by virtue of the attorney-client privilege, work
8 product doctrine, deliberative process privilege, and/or a
9 privacy-based privilege. Plaintiffs correctly point out that
10 defendants waived any applicable evidentiary privileges by
11 failing to timely provide plaintiffs with privilege logs and
12 supporting declarations.

13 The party asserting evidentiary privileges has the
14 burden of proving that the privileges apply to the documents or
15 communications the party seeks to withhold. In re: Grand Jury
16 Investigation v. The Corp., 974 F.2d 1068, 1070 (9th Cir.
17 1992) (dealing with attorney-client privilege); Verizon Cal., Inc.
18 v. Ronald A. Katz Tech. Licensing, L.P., 266 F.Supp.2d 1144, 1147
19 (C.D. Cal. 2003) (dealing with work product privilege); N.
20 Pacifica, LLC v. City of Pacifica, 274 F.Supp.2d 1118, 1122 (N.D.
21 Cal. 2003) (dealing with deliberative process privilege). To meet
22 this burden, the party asserting a privilege must produce more
23 than just "boilerplate objections or blanket refusals" in
24 response to a request for production of documents. Burlington N.
25 v. United States Dist. Court For the Dist. of Mont., 408 F.3d
26 1142, 1149 (9th Cir. 2005). The burden may be met by the
27 submission of a detailed privilege log, but only if such log is
28 submitted in a timely manner. Id. at 1147. The log must also

1 contain supporting affidavits or other competent evidence to
 2 prove the applicability of asserted privileges. In re Heritage
 3 Bond Litig., 2004 WL 19700058 *2 (C.D. Cal. 2004).

4 In Burlington, a case decided just this year, the Ninth
 5 Circuit explained how district courts are to determine whether a
 6 privilege log was submitted in a timely manner. 408 F.3d at 1149.
 7 In deciding the issue, the Burlington Court first noted that
 8 Federal Rule of Civil Procedure 34 sets a 30-day deadline for
 9 responding to a discovery request in writing. The court
 10 concluded that Rule 34 thus "imposes a bright-line rule" defining
 11 timeliness, but found that it contains no explicit prohibition
 12 against boilerplate objections or assertions of privilege. Id.
 13 at 1147. The court went on to note, however, that Federal Rule
 14 of Civil Procedure 26(b)(5)¹ does require that a proper assertion
 15 of privilege be more specific than a generalized, boilerplate
 16 objection. The court acknowledged that Rule 26(b)(5) does not
 17 "specifically correlate this [specificity] requirement with Rule
 18 34's bright-line rule for timeliness, nor does it explicitly
 19 articulate a waiver rule." Id. However, in examining the notes
 20 accompanying the relevant paragraph to Rule 26(b)(5), the court
 21 found that waiver of privilege would be appropriate where Rule

22
 23 ¹ **Claims of Privilege or Protection of Trial Preparation**
 24 **Materials.** When a party withholds information
 25 otherwise discoverable under these rules by claiming
 26 that it is privileged . . . , the party shall make the
 27 claim expressly and shall describe the nature of the
 28 documents, communications, or things not produced or
 disclosed in a manner that , without revealing
 information itself privileged . . . will be enable
 other parties to assess the applicability of the
 privilege. . . .

28 Fed. R. Civ. P. 26(b)(5).

1 26(b) (5)'s requirements were not met. Id.

2 The Ninth Circuit then acknowledged that no Circuit has
3 explicitly weighed in on the precise relationship between the
4 requirements of Rule 26(b) (5) and Rule 34's deadline, and noted
5 that a survey of district court cases revealed "a mixed bag,"
6 ranging from a permissive approach where boilerplate objections
7 were accepted at any time to a strict approach finding waiver
8 where a party failed to meet a more strict construction of Rule
9 26(b) (5) within Rule 34's 30-day time limit. Id. at 1148. "In
10 order to honor the spirit of the Rules," the court then concluded
11 that it would "chart a middle road through the wide spectrum of
12 caselaw regarding discovery by reading Rules 26(b) (5) and 34
13 together. . . ." Id. at 1149.

14 The Ninth Circuit held that boilerplate objections or
15 blanket refusals in response to a Rule 34 request for production
16 of documents are insufficient to assert a privilege. However, it
17 rejected a per se waiver rule that would deem a privilege waived
18 if a privilege log intended to meet Rule 26(b) (5)'s requirements
19 were not produced within Rule 34's 30-day time limit. Id. The
20 court then held that district courts are to use the 30-day
21 deadline for responding to document requests contained in Federal
22 Rule of Civil Procedure 34 as a "default guideline" to make a
23 "case-by-case determination" of timeliness for meeting Rule
24 26(b) (5)'s requirements by considering several factors. Id. The
25 factors are: (1) the degree to which the objection or assertion
26 of privilege enables the litigant seeking discovery and the court
27 to evaluate whether each of the withheld documents is privileged;
28 (2) the timeliness of the objection and accompanying information

1 about the withheld documents; (3) the magnitude of the document
2 production; and (4) other particular circumstances of the
3 litigation that make responding to discovery unusually simple or
4 unusually difficult. Id.

5 The Burlington factors are generally to be applied "in
6 the context of a holistic reasonableness analysis," aimed at
7 preventing needless waste of time and manipulation of the
8 discovery process. Id. Though the Ninth Circuit stopped short
9 of providing a bright-line rule, the Burlington Court did
10 specifically note that "in the absence of mitigating
11 considerations," a district court would be justified in finding
12 that a party had waived its asserted privileges by submitting a
13 privilege log five months after the Rule 34 deadline. Id.

14 The instant case seems to be just the sort of case the
15 Ninth Circuit had in mind with that observation. Plaintiffs
16 served their first request for production of documents on May 13,
17 2004. Defendants responded on June 21, 2004, in part by making
18 numerous assertions of privilege without submitting a
19 contemporaneous privilege log. Defendants correctly point out
20 that plaintiffs have failed to cite any source indicating that
21 such a log "must be tendered contemporaneously with the privilege
22 based objection." (Defs.' Reply Brief Re: Privileged Materials
23 Submitted Under Seal at 3). However, defendants readily
24 acknowledge that they did not produce a privilege log until
25 November 10, 2004, "approximately six months after [p]laintiffs
26 served their first set of document requests, and approximately
27 two months after plaintiffs served their second set of document
28 requests." (Id.) (emphasis added). Under Burlington, defendants'

1 delay in adequately responding to plaintiff's first request for
2 document production is thus presumptively untimely absent
3 mitigating considerations.

4 Nor does it help defendants' case in this regard for
5 them to point out that they submitted a declaration of campus
6 counsel Steve Drown in support of their claims for attorney-
7 client privilege and work product immunity. (Id.). Defendants
8 fail to mention that the declaration was not signed until August
9 9, 2005 and not submitted until August 10, 2005, at least a year
10 after the Rule 34 deadline had passed for either set of
11 plaintiffs' document requests. (Id. Ex. A (Drown Decl.)). This
12 late submission only compounds defendants' delay. The same must
13 be said for the declaration of Larry N. Vanderhoef, chancellor of
14 the University of California campus at Davis. That declaration,
15 which attempts to invoke the deliberative process privilege and
16 to provide a factual context for invoking the privilege, was also
17 not signed until August 9, 2005, and not submitted to the court
18 until August 10, 2005. (Id. Ex. B (Vanderhoef Decl.)). The
19 court further observes that defendants have not referred it to a
20 single declaration to establish their other privacy-based
21 privileges.

22 The fact that defendants felt compelled to submit the
23 declarations they did submit to supplement their November 10,
24 2004 privilege log is also an implicit admission that, without
25 them, the privilege log was insufficient to establish defendants'
26 claimed privilege. See In re Heritage Bond Litig., 2004 WL
27 19700058 at *2 (party asserting privilege must support application
28 of privilege with competent evidence). This means that the

1 privileges asserted in response to both plaintiffs' requests for
2 production of documents were not adequately supported until
3 August 10, 2005, well beyond the point under Burlington where
4 defendants were required to present mitigating considerations for
5 their delay.

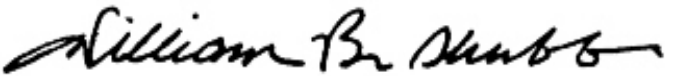
6 Further, defendants have failed to present any
7 mitigating considerations for their delay, apparently relying on
8 plaintiffs' failure to provide relevant citation or, as it turns
9 out, to point them to Burlington. This is unacceptable. The
10 court will not neglect to apply the appropriate legal standard
11 simply because the parties have overlooked it. See United States
12 Nat'l Bank v. Indep. Ins. Agents of Am., 508 U.S. 439, 446
13 (1993) ("[W]hen an issue or claim is properly before the court,
14 the court is not limited to the particular legal theories
15 advanced by the parties, but rather retains the independent power
16 to identify and apply the proper construction of governing
17 law.") (citation omitted). Defendants delayed demonstrating the
18 applicability of their asserted evidentiary privileges for too
19 long. Nor have they presented any mitigating circumstances for
20 their delay. Therefore, the court finds that defendants have
21 waived their privileges. See Burlington, 408 F.3d at 1149.

22 Defendants appear to be particularly concerned about
23 documents allegedly protected by the deliberative process
24 privilege. Defendants represent that the documents in question
25 are unrelated to their decision to terminate plaintiff Michael
26 Burch. (See Defs.' Reply Re: Privileged Materials Submitted
27 Under Seal at 8). Therefore, defendants should not be alarmed
28 that plaintiffs will be able to review these documents in

1 preparing their case. Defendants' primary concern would thus
2 appear to be that the documents at issue contain private
3 correspondence among University personnel regarding University
4 policy - much of it regarding the University's public response to
5 allegations of discrimination - that defendants do not wish to
6 have publicly disclosed. If this is truly defendants' concern,
7 defendants may seek a protective order for any documents for
8 which defendants asserted a deliberative process privilege.

9 IT IS THEREFORE ORDERED that defendants produce all
10 documents requested in plaintiffs' May 31, 2005 motion to compel
11 for which defendants' have asserted attorney-client, work
12 product, deliberative process, or privacy-based privileges by
13 **September 12, 2005.**

14 DATED: August 30, 2005

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17 WILLIAM B. SHUBB
18 UNITED STATES DISTRICT JUDGE
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